

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

---

KEITH TOLBERT,	:	
Plaintiff,	:	
	:	
v.	:	No. 2:22-cv-01228
	:	
DR. STEPHEN WEINER, <i>et al.</i> ,	:	
Defendants.	:	

---

**ORDER**

**AND NOW**, this 28<sup>th</sup> day of November, 2022, upon consideration of Defendants Wellpath Health Services and Dr. Stephen Wiener's<sup>1</sup> motion to dismiss, ECF No. 13, Plaintiff Tolbert's response thereto, ECF No. 24, and for the reasons set forth in this Court's Opinion issued on this date, **IT IS HEREBY ORDERED THAT:**

1. Wellpath Health Services and Dr. Wiener's Motion to Dismiss, ECF No. 13, is **GRANTED in part and DENIED in part**, as follows:

- a. Tolbert's claims for deliberate indifference under the Eighth Amendment (Count III) and medical malpractice (Count I) may proceed as pleaded. Defendants' motion to dismiss these counts is **DENIED**.
- b. Tolbert's First Amendment claim (Count IV) against Dr. Wiener is **DISMISSED WITHOUT PREJUDICE** as to this defendant only. Tolbert's claim under the Pennsylvania Constitution (Count II) is also **DISMISSED**

---

<sup>1</sup> Dr. Wiener has since been substituted in this action by Nicola S. Wiener for Dr. Wiener's estate. *See* ECF No. 36.

**WITHOUT PREJUDICE.** Therefore, Defendants' motion to dismiss these counts is **GRANTED**.

2. The case is **DISMISSED** without prejudice as to Defendant Wellpath Health Services, only, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A).<sup>2</sup>

3. The Clerk of Court is directed to **TERMINATE** Wellpath Health Services as a defendant in this action.

4. Tolbert is granted leave to amend his Complaint to renew any of the dismissed claims, and if he chooses to do so, the amended complaint must be filed **no later than December 27, 2022**. Tolbert's failure to timely file an amended complaint will result in dismissal of these claims with prejudice and without further notice.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.  
JOSEPH F. LEESON, JR.  
United States District Judge

---

<sup>2</sup> In his response, Tolbert voluntarily dismisses his claims against Wellpath Health Services, informing the Court that he has seen a neurologist since the Complaint was filed, and therefore his request for injunctive relief against Wellpath Health Services is now moot.